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IN THE

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND AARP IN SUPPORT OF THE RESPONDENT

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and

Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including persons seeking to vindicate their rights under federal civil rights statutes and other legislation affording them a private right of action for statutory violations. ATLA views the judicial power of the courts of the United States to grant meaningful relief for such violations, including punitive damages where appropriate, is essential to safeguarding the rights of those for whose protection Congress enacted such legislation.

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts. Many AARP members with disabilities rely on the ADA and the Rehabilitation Act to assure access to public programs and services in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than

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1 Pursuant to Rule 37.6, Amici discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amici Curiae, their members, or its counsel make a monetary contribution to the preparation or submission of this brief.

other populations. Punitive damages are an important tool in the effort to enforce the ADA and the Rehabilitation Act, as well as other related civil rights statutes.

SUMMARY OF THE ARGUMENT

I. ATLA and AARP are primarily concerned by the position advanced by the United States as *amicus curiae* in support of Petitioners: Unless Congress has explicitly prescribed the relief available in a private right of action, the authority of federal courts to grant relief ought to be limited awards of compensatory damages. ATLA and AARP view this as a novel and radical limitation on the authority of the courts to fashion appropriate relief for violations of legal rights. Adoption of the Solicitor General's position would limit the remedies available to the courts and would amount to a dramatic subordination of the judicial branch to the legislative branch of government.

While the court looks to legislative intent to ascertain whether a private right of action exists, the analytically distinct authority to grant a particular form of relief has historically has resided in the judicial power exercised by the courts of the United States. This Court's decision in *Franklin v. Gwinnett County Public Schools* makes clear that, once a cause of action is found to exist, federal courts have the authority to grant all appropriate remedies. The Solicitor General's effort to restrict remedies to compensatory damages conflicts with this Court's cases.

This Court's decision in *International Brotherhood of Electrical Workers v. Foust* does not establish a countervailing presumption against punitive damages

in such cases. The ruling in that case addressed a specific conflict with the statutory scheme involved.

II. Permitting courts to award punitive damages in action bought under provisions of the Rehabilitation Act and the ADA would not conflict with the purposes of those enactments. The functions of punishment and deterrence of violations of the statutes are consistent with the aims of Congress. Additionally, imposing punitive damages to remove economic incentives to violate the statutes and to offer an economic incentive for private litigants to enforce the statutes through private suits both further the aims of the statutes.

III. Permitting courts to award punitive damages would not subject defendants to unfettered or unbounded jury discretion to impose large damage awards. Punitive damages have historically been subject to close judicial control to guard against excessive awards. This Court's decisions demonstrate that jury awards for punitive damages are more tightly controlled than compensatory damage awards to protect defendants.

ARGUMENT

I. UNLESS RESTRICTED BY CONGRESS, FEDERAL COURTS POSSESS THE JUDICIAL POWER TO GRANT ANY APPROPRIATE RELIEF IN A STATUTORY CAUSE OF ACTION.

The Question Presented in this case involves not only a complex task of statutory construction, but also touches upon fundamental matters of the authority of the federal courts. The lower court held that Jeffrey Gorman could proceed under "an implied cause of action" for harm resulting from defendants' violation of

Title V, section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("section 504"), and Title II, section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("section 202"). *Gorman v. Easley*, 257 F.3d 738, 745 (8th Cir. 2001). Respondent argues persuasively that Congress expressly intended to create a cause of action, including a damages remedy, and ATLA and AARP agree.

Amici is most concerned, however, by the argument advanced by the United States as *amicus curiae* in support of Petitioners: Unless Congress has explicitly prescribed the relief available in a private right of action (which encompasses nearly every implied cause of action or express cause of action where Congress is silent as to relief), the authority of federal courts to grant relief ought to be limited to compensatory damages. Brief of the United States at 11-20.

The Solicitor General proposes a novel and radical limitation on the authority of the courts to fashion appropriate relief for violations of legal rights. Historically, the authority to grant appropriate relief has resided in the judicial power exercised by the courts of the United States. Congress can prescribe limits on the remedies available under its enactments. However, to hold that this authority exists only to the extent Congress has affirmatively bestowed it upon the courts would amount to a dramatic subordination of the judicial branch to the legislative branch of government.

A. Where the Right to a Remedy Affords a Private Cause of Action, the Court Has the Authority to Grant Relief Appropriate to Make the Remedy Meaningful.

The right to seek legal redress for violation of rights is an ancient one. Sir Edward Coke traces this fundamental principle to Chapter 29 of the Magna Carta. 1 Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *55 (London, E.&R. Brooke 1797). Lord Coke further emphasized that '[E]very Act of Parliament made against any injury, mischiefe, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved [by any violation of Act].' *Id.* at *55.

This maxim was restated by Blackstone as the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded," and it is an "invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *23 & *109 (1765). In Coke's view, the courts' authority to provide a legal remedy was not a matter of legislative grace, but of judicial power, curbing the authority of Parliament for the benefit of the people. *See* H. Miles Foy, III, *Some Reflections On Legislation, Adjudication, And Implied Private Actions In The State And Federal Courts,* 71 Cornell L. Rev. 501, 528-29 (1986).

Lord Coke's explication of the Magna Carta exerted a profound influence on this nation's founding generation. *See Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("The American colonists were intimately familiar with Coke"), and on the drafters of state constitutions, thirty-eight of which include explicit guarantees of the right to a remedy. *See* Justice Leeson's scholarly discussion in

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340-43 (Ore. 2001).

This Court addressed the right to a remedy in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). Chief Justice John Marshall declared that the "very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. Justice Marshall established what would become the paradigm of this Court's analysis. Having first determined that Marbury was entitled to a legal remedy, in the form of a cause of action, he inquired next whether the form of relief prayed for was within the judicial power of the Court to grant. In that case, Justice Marshall held that the relief – a writ of mandamus – was not within the Article III powers of the Court exercising original jurisdiction (despite an Act of Congress conferring that power).

The Court applied the right to a remedy to permit a private right of action for violation of a federal statute in *Texas & Pacific Railway v. Rigsby,* 241 U.S. 33 39-40 (1916). This Court has repeatedly emphasized that question of whether a private cause of action can be maintained is "analytically distinct" from whether the court can grant a particular form of relief. *Davis v. Passman,* 442 U.S. 228, 239 (1979). This Court has never suggested that the judicial power to afford such relief is dependent upon an affirmative grant by Congress. Rather, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood,* 327 U.S. 678, 684 (1946).

The Court reaffirmed this principle in *Franklin v. Gwinnett County Public Schools*:

> As we have often stated, the question of what remedies are available under a statute that provides a private right of action is "analytically distinct" from the issue of whether such a right exists in the first place. Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence. . . . From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . .

503 U.S. 60, 66 (1992).

The Court emphasized that "this longstanding rule [is] jurisdictional" and flows from "the federal courts' power" to award appropriate relief. *Id. Franklin* forecloses the argument pressed by the Solicitor General in this case.

B. *Franklin* Confirms the Availability of Punitive Damages In Appropriate Cases for Violation of Section 202 and Section 504.

The Solicitor General attempts to reinterpret *Franklin's* clear language, arguing that by "remedies to redress injuries" the Court meant only compensatory damages, excluding forms of relief that go beyond the recompense required to make the plaintiff whole. Brief of United States at 15-16.

The Court rejected precisely that narrow definition as "novel" and "strained" in *Smith v. Wade*,

461 U.S. 30, 36 (1983). There the Court held that punitive damages are available in a private right of action under § 1983, and specifically rejected the argument that "for redress" at the end of the section meant that Congress intended to limit recovery to compensatory damages. *Id.* As Justice Stevens more recently explained:

> When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated. Thus, in some cases a tort is redressed by an award of punitive damages; . . . History supports the proposition that punishment or deterrence can redress an injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 127 (1998) (Stevens, J., concurring).

This Court's own usage rejects the narrow reading the Solicitor General would impose on *Franklin's* language Both before and after *Franklin*, the Court has referred to punitive damages as a "remedy" and a form of "redress" in the context of a private right of action. In *Carlson v. Green*, 446 U.S. 14, 22 (1980), for example, the Court observed:

> Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens*, 403 U.S. at 397, 91 S. Ct. at 2005, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. . . [Moreover] "punitive damages may be the only significant remedy available in some § 1983 actions.

446 U.S. at 22 & n.9 (underscoring added). *See also Curtis v. Loether*, 415 U.S. 189, 196 (1974) ("the relief

sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 & 257 (1984) (punitive damages "have long been a part of traditional state tort law," providing "adequate remedies for those who are injured by exposure to hazardous materials."); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) ("With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of Title VII and ADA violations."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647-648 n.11 (1999) ("Under the Patent Remedy Act, States are subject to all the remedies available to plaintiffs in infringement actions, which include punitive damages") (underscoring added).

The Solicitor General suggests that the door remains open for his novel interpretation of *Franklin* because the plaintiff in that case did not seek punitive damages. Brief of the United States at 12. If so, the Court definitively closed that door in *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999). The Court reaffirmed its holding in *Franklin* that money damages are available in an implied private right of action under Title IX, *Id.* at 639-640, and held that plaintiff was entitled to maintain her cause of action seeking both compensatory and punitive damages. *Id.* at 636.

The inescapable conclusion is that this Court's holding in *Franklin*, that "all appropriate remedies" are presumptively available, plainly includes the remedy of punitive damages.

On the basis of that clear language, the majority of courts following *Franklin* have ruled that punitive

damages may be awarded in a private cause of action for violation of Section 202 or Section 504 where supported by the evidence. *See Filardi v. Loyola Univ.*, 1998 WL 111683 (N.D. Ill. Mar. 12, 1998) (denying motion to strike plaintiff's claim for punitive damages under section 504); *Saylor v. Ridge*, 989 F. Supp. 680, 690-91 (E.D. Pa. 1998) (allowing a legally blind person to recover punitive damages under the Rehabilitation Act and Title II of the ADA); *Burns-Vidlak v. Chandler*, 980 F. Supp. 1144, 1152 (D. Haw. 1997) (denying partial summary judgment because punitive damages are available under section 504); *Todd v. Elkins*, 105 F.3d 663 (8th Cir.1997) (unpublished) (upholding denial of motion to dismiss a § 504 claim seeking punitive damages); *Kilroy v. Husson College*, 959 F. Supp. 22, 24 (D. Maine. 1997) (punitive damages recoverable under § 504 based on proof of malice or reckless indifference to federally protected rights); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 134 (D. Conn. 1997) ("the analysis developed in *Franklin* . . . inescapably leads to the conclusion that both compensatory and punitive damages are available" under § 504); *Garrett v. Chicago School Bd. of Trustees*, 1996 WL 411319 (N.D. Ill. July 18, 1996) (pregnant student may recover compensatory and punitive damages for discrimination under § 504); *Simenson v. Hoffman*, 1995 WL 631804 (N.D. Ill. Oct. 20, 1995) (child who was refused medical treatment may recover punitive damages under § 504 if intentional discrimination is proven); *Mild v. Mehlville Public School Dist.*, 1995 WL 819138 (E.D. Mo. Sept. 18, 1995) (employee may recover punitive damages under § 504 if discriminatory treatment resulted from a handicap); *Zaffino v. Surles*, 1995 WL 146207 (S.D.N.Y. Mar. 30, 1995) (denying motion to dismiss claim for punitive damages under § 504 for intentional discrimination);

DeLeo v. City of Stamford, 919 F. Supp. 70, 75 (D. Conn. 1995) (punitive damages are "within the full panoply of remedies" under § 504); *Kedra v. Nazareth Hosp.*, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (punitive damages are available under § 504 to employees claiming intentional discrimination); *Doe v. William Shapiro, Esquire, P.C.*, 852 F. Supp. 1246, 1255 (E.D. Pa. 1994) (punitive damages may be recovered under the ADA). *Pandazides v. Virginia Bd of Education*, 13 F.3d 823, 830 (1994) (prior decision that punitive damages were unavailable under § 504 "can no longer be considered good law" following *Franklin*). *Cf., Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1078 (D. Nev. 2001) (following *Franklin*, punitive damages may be recovered under Title IX). *Contra, Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 791 (6th Cir. 1996) (punitive damages unavailable under Rehabilitation Act); *Winfrey v. City of Chicago*, 957 F. Supp. 1014, 1025 (N. D. Ill. 1997) (same).[2]

ATLA submits that the lower courts, and the Eighth Circuit in this case, correctly understood and applied this Court's decision in *Franklin*.

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[2] Even prior to *Franklin*, some courts viewed punitive damages as recoverable. *See e.g. Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) ("Although punitive damages are presumably available under § 504, the Court finds that the assessment of such damages against defendant is not justified under the facts of this case"); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (full panoply of remedies available under § 504 but not against a State because of the Eleventh Amendment).

C. There is No Basis for a Presumption Against Punitive Damages.

The Solicitor General purports to identify a presumption contrary to *Franklin* in this Court's opinion in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). In the Solicitor General's view, *Foust* "held that a punitive damages remedy should not be inferred '[a]bsent clear congressional guidance' to the contrary." Brief of United States at 11, quoting 442 U.S. at 52. "That presumption, and not the one in *Franklin*, should govern the remedy issue in this case." *Id.*

The Solicitor General misreads *Foust*. There a railroad worker who had been discharged following an injury sued his union under the Railway Labor Act. He alleged that the union had breached its duty of fair representation by failing to properly file a grievance with the company. Plaintiff's suit was based on an implied right of action under the Act for which Congress had made no provision regarding remedies. *Id.* at 47. The Court ruled that punitive damages were not available to plaintiff. Justice Marshall, writing for the majority, gave no indication that the Court was led to this result by a general presumption against punitive damages in implied causes of action. Rather, he focused on a specific conflict between plaintiff's claim and the purposes of the Railway Labor Act. The statute encouraged – indeed depended upon – the broad discretion of union representatives to pursue some grievances, settle others, and dismiss those deemed frivolous. *Id.* at 51. Potential liability for punitive damages, the Court stated, would deter the union's exercise of discretion in handling and screening claims. The result would be to render "impracticable" the collective-bargaining system established in the very

statute that gave *Foust* his right to sue. *Id.* at 51-52. "Absent clear congressional guidance," as to how this tension should be resolved, the Court ruled that punitive damages should not be awarded. *Id.* at 52.[3]

The narrow scope of the Court's decision was underscored in a concurring opinion by Justice Blackmun, joined by three other Justices. Justice Blackmun stated that the general rule set forth in the Court's previous cases remains:

> [A] court, seeking a remedy to match the union's wrong, has at its disposal the full panoply of tools traditionally used by courts to do justice between parties. Punitive damages, being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise.

442 U.S. at 53 (Blackmun, J., concurring).

This case presents no such conflict. The punitive damage award rendered below was imposed to deter willful violation of the federal statutes. This is wholly consistent with the purposes of the statute and does not deter conduct that Congress intended to encourage.[4]

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[3] The Court's ruling that punitive damages are unavailable in certain defamation lawsuits rests on similar reasoning: Punitive awards may deter not only defamatory speech, but also First Amendment protected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

[4] The additional argument, lifted from *Foust*, that punitive damages might by used by juries "to punish unpopular defendants," is particularly inapt in this case. Brief of United States at 17. There is no reason to believe the recipients of federal grants are especially despised. Rather, Congress enacted the Americans

II. THE AVAILABILITY OF PUNITIVE DAMAGES IS CONSISTENT WITH THE PURPOSES OF SECTION 504 AND SECTION 202.

A. Permitting Recovery of Punitive Damages in a Private Right of Action Does Not Undermine the Role of Congress in Defining Criminal Punishment or in Setting Policy.

The Solicitor General characterizes punitive damages as "quasi-criminal," imposed solely for punishment and deterrence, which are policy matters best left to the legislature. Brief of United States at 18-19. Congress in creating a right can, of course, limit the kinds of relief that may be granted for its violation. It can thereby preclude any perceived conflict with its scheme of criminal or administrative enforcement regime. But private punitive damage remedies do not inherently conflict with public enforcement, as the Solicitor General suggests.

In fact, Congress has expressly provided for recovery of punitive damages by individuals in actions under a variety of statutes. See, e.g., 11 U.S.C. § 303(i)(2)(B) (petition for involuntary bankruptcy filed in bad faith), 11 U,S.C. § 362(h) (willful violation of automatic stay in bankruptcy); 11 U.S.C. § 363(n) (collusive bidding in sale of property); 12 U.S.C. § 3417(a)(3) (punitive damages against agency or department of the United States government for improper disclosure of financial information); 15 U.S.C. § 78u(h)(7)(A)(iii) (against Securities Exchange Comm.

With Disabilities Act expressly because "individuals with disabilities continually encounter various forms of discrimination." 42 U.S.C. § 12101(a)(5).

Involving financial records); 15 U.S.C. § 298(c) (in actions brought by jewelry trade association under statute outlawing commerce in falsely stamped gold or silver goods), 15 U.S.C. § 1116(d)(11) (wrongful seizure of goods alleged to be in violation of patent or trademark), and 15 U.S.C. § 1681n(2) (liability to consumer for obtaining consumer credit report under false pretenses); 15 U.S.C. § 1691e(b) (punitive damages in suit by individual for denial of equal credit opportunity); 26 U.S.C. § 7431(c)(1)(B)(ii) (by taxpayer against the United States for improper inspection or disclosure of tax return information).

Congress authorizes private recovery of punitive damages in these and other statutes to further its legislative policies and supplement criminal or administrative enforcement. Where Congress is silent with respect to punitive relief, the court should inquire whether such a remedy conflicts with the purpose of the enactment. However, there is no basis for a blanket presumption that such relief intrudes on the powers of Congress. Brief of the United States at 20.

B. Punitive Damages Further Statutory Goals Beyond Punishment and Deterrence.

The Solicitor General is also incorrect in asserting that permitting damages beyond recompense for injuries is simply "a windfall to a fully compensated plaintiff," Brief of United States at 16, and a cost that "does not justify the award of additional damages to serve broader societal goals of punishment and deterrence." *Id.* at 18.

Punishment and deterrence of wrongdoing are important objectives, but they are not the sole function

of punitive damages. It has long been recognized that where the motivation of the wrongdoer is monetary, punitive damages may serve to remove the financial incentive for continuing the wrongful conduct. In other situations, punitive damages serve a "quasi-compensatory" function of encouraging the victims to bring lawsuits to supplement governmental enforcement. Both these functions are applicable to section 202 and section 504 and further the aims of those statutes.

The purpose of tort liability is not only to compensate injured victims, but also to prevent injury in the first place. *See* American Bar Association, TOWARDS A JURISPRUDENCE OF INJURY 4-1 (1984); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984); William M. Landes and Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987). Punitive damages have long been recognized as an integral part of tort law precisely because compensatory damages may not be sufficient to accomplish this purpose. *See* Clarence Morris, *Punitive Damages in Tort Cases,* 46 Harv. L. Rev. 1173, 1177 (1931) (punitive damages merely increase the severity of the "admonitory" function of compensatory damages).

Courts have recognized that in some circumstances, defendants may see economic advantage in paying compensatory claims while continuing to engage in harmful conduct. The Ford Pinto case is a classic, but hardly isolated example. Ford Motor Company knew before the first Pinto was sold that the fuel system was particularly hazardous in the event of rear-end collision. An internal memo estimated that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the

hazard could be eliminated for less than $11 per car. Ford nevertheless determined that it was more profitable to pay compensatory damage claims than to make the car safer. Punitive damages were appropriate to remove the incentive to willfully expose consumers to grave risk. *See Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981); *Ford Motor Co. v. Durrill*, 714 S.W. 329 (Tex. Ct. App. 1986); Keeton, Owen, and Montgomery, CASES AND MATERIALS ON PRODUCT LIABILITY AND SAFETY 490-91 (1980) (reproducing portions of the Ford internal memo, "Fatalities Associated With Crash-Induced Fuel Leakage and Fires").

Similarly, in *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), the court upheld punitive damages for a four-year old child who was severely burned when her pajamas caught fire. The court pointed out that the manufacturer was aware of burn injuries caused by its highly flammable cotton sleepwear and that the company was facing a liability "powder keg." Nevertheless, the company calculated that it would be more costly to treat the material with a flame retardant. *Id.* at 733-34, 740.

As these decisions demonstrate, the amount of punitive damages can be calibrated in a particular case to remove the economic advantage of misconduct. This purpose is directly applicable in this case, where the recipient of federal money willfully failed to provide access for the disabled required under section 202 and section 504. Although the compensatory award in this case turned out to be substantial, the cost of providing access can also be substantial. Facing no potential liability for punitive damages, a recipient might

anticipate that it would be cheaper to pay the occasional injury claim than to bear that expense.

Such concerns are especially important under the statutory scheme in this case. As Petitioner indicates, the "draconian" remedy of terminating federal funds "is imposed only as a last resort, and only after an exacting series of due process measures have been exhausted." Brief of Petitioner at 16. Under such circumstances, a recipient might reasonably estimate that the likelihood of a cut-off for noncompliance with access provisions is remote, increasing the importance of the threat of punitive damages to furthering the statutory aims.

C. Punitive Damages Provide an Incentive for Private Citizens to Enforce the Law.

Courts have also recognized that punitive damages perform a quasi-compensatory role in appropriate circumstances by providing an incentive for private citizens to supplement governmental enforcement through private lawsuits.

Congress has expressly provided for monetary damages beyond compensatory relief in the form of treble damages for precisely this purpose. See, e.g., 15 U.S.C. § 15(a) (Clayton Antitrust Act); 18 U.S.C. § 1964(c) (RICO); 12 U.S.C. § 2607(d)(2) (treble damages for violation of anti-kickback requirement in settlement of federally-related mortgages); 15 U.S.C. § 1117(b) (treble damages for intentional use of counterfeit trademarks); 15 U.S.C. § 1693f(e) (treble damages for failing to correct erroneous electronic fund transfers); 25 U.S.C. § 305e(a)(2)(A) & (b) (treble and punitive damages for misrepresentation of Indian-produced goods); 35 U.S.C. § 284 (treble damages for patent infringement).

This Court has recognized that multiple damages are similar to punitive damages and are intended by Congress as an incentive for litigants to bring suit to enforce statutory rights, thus supplementing the resources of the Justice Department. *American Society of Mechanical Engineers,* 456 U.S. 556, 575 (1982); *Reiter v. Sonotone Corp.,* 442 U .S. 330 (1979). As the Court recently stated, the treble damage remedies available under RICO and the Clayton Act "share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." Their object is to encourage victims to act as "private attorneys general," *Rotella v. Wood,* 528 U.S. 549, 557 (2000); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 199 (1997).

This function of punitive damages also furthers the objectives section 504 and section 202. Indeed, when Congress enacted the Civil Rights Act of 1991, it added a punitive damages remedy for intentional employment discrimination. *See* 42 U.S.C. § 1981a(b). The House Report explained that such relief is "necessary to encourage citizens to act as *private attorneys general* to enforce the statute." H. Rep. No. 102-40(I), at 64 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602 (emphasis added).

Even aside from the restrictions on judicial power, when Congress is silent on the issue of forms of relief under its statutes, it makes little sense to make the availability of relief dependant upon some manner of "inferred" legislative intent. The court should inquire instead whether punitive damages are consistent with the purposes of the statute. A punitive damages

remedy that will provide a disincentive for fund recipient to willfully violate the law, and an incentive for private litigants to bring suit to enforce the statute, clearly furthers those legislative goals.

III. PUNITIVE DAMAGE AWARDS ARE CONTROLLED BY JUDICIAL REVIEW

The Solicitor General argues against exposing defendants to the "nearly unfettered discretion" of juries, handing out "unbounded punitive damage awards." Brief of United States at 25-26. The Solicitor General all but ignores a decade of decisions in which this Court addressed precisely that issue.

In *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), the Court emphasized that the common law procedure for imposing punitive damages encompasses not only the determination by the jury, but also post-verdict judicial review to assure that the amount of the award is reasonable. *Id.* at 15. The Court reviewed the "detailed substantive standards" developed by the Alabama court to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence," observing that "[t]hese standards have real effect when applied" to jury awards. *Id* 21-22

Of course, Alabama was hardly unique in subjecting punitive damage verdicts to close judicial control. This Court noted that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Honda Motor Co. v. Oberg,* 512 U.S. 415, 421 (1994). As the Alaska Supreme Court explained, "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place." *Sturm, Ruger & Co. v. Day,*

594 P.2d 38, 48 (Alaska 1979). *See also Wangen v. Ford Motor Co.*, 97 Wis. 2d 260. 298, 294 N.W.2d 437, 457 (1980) ("judicial controls . . . provide for fair administration of punitive damage awards in this state.").

Even before this Court's decisions regarding constitutional limits on punitive damages, it was generally recognized that "the court exercises much closer supervision over [punitive] awards than is the case with compensatory awards." *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). *Accord, Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934 (1990); *Deal v. Byford,* 127 Ill. 2d 192, 203, 130 Ill. Dec. 200, 205, 537 N.E.2d 267, 272 (1989). This fact is confirmed by empirical findings that punitive damages are reduced post-verdict far more often than compensatory awards. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States 47 (Sept. 1989); M. Peterson, S. Sarma and M. Shanley, Punitive Damages: Empirical Findings 30 (Rand Corp. 1987).

This Court held that judicial review of the amount of punitive damage verdicts has been so long and widely practiced at common law and so important to protecting against excessive judgments that defendants are entitled to such review as a matter of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994).

In addition, this Court has imposed procedural and substantive limitations on the amounts of punitive damage awards, *Haslip, supra,* and has established guidelines for evaluating their excessiveness. *BMW v.*

Gore, 517 U.S. 559 (1996). Moreover, the Court has authorized federal appellate courts to review the amount of punitive damage awards *de novo. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001).

The notion that jury discretion to award punitive damages is "unfettered" and "unbounded" is simply untrue. Such awards are clearly subject to far tighter scrutiny and control by the courts than compensatory damage awards.

When Congress enacted the Civil Rights Act of 1991, it provided a punitive damages remedy in employment discrimination suits, subject to a predetermined cap on their amount. Its decision not to impose a similar restriction in sec. 504 and 202 does not compel the conclusion that Congress disapproved of punitive damages in such cases. Rather, Congress may reasonably have intended to rely on judges to restrict jury awards on a more flexible, case-by-case basis. This Court should hold that federal courts may award punitive damages in appropriate case

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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